

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Residential Real Estate
Salesperson License of Randolph J. Kubes,
License No. 780799

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on July 24, 2012, pursuant to a Scheduling Order, filed April 16, 2012. The hearing took place at the Scott County Courthouse in Shakopee, Minnesota. The record closed upon receipt of the parties' post-hearing submissions on August 6, 2012.

Michael J. Tostengard, Assistant Attorney General, represents the Minnesota Department of Commerce (Department). James T. Martin, Attorney at Law, represents Randolph J. Kubes (Licensee).

STATEMENT OF ISSUES

1. Did Licensee violate Minn. Stat. § 82.81, subd. 1, by making a misleading statement of omission which was of a character likely to influence, persuade, or induce the consummation of a transaction as defined by subdivision 12 (10)?
2. Did Licensee violate Minn. Stat. § 82.67, subd. 3 (2), by failing to act in his client's best interest?
3. Did Licensee violate Minn. Stat. § 82.67, subd. 1, by failing to provide an Agency Disclosure Form to his client at the first substantive contact?

The ALJ concludes that the Department has established by a preponderance of evidence a factual basis to impose a sanction on the real estate license of Licensee.

FINDINGS OF FACT

1. Licensee has been a licensed residential real estate agent in Minnesota since 1986, a period of approximately twenty-six years. Licensee has not been the subject of any disciplinary matters relative to his real estate practice, except for the present complaint that resulted from the short sale real estate transaction described below.¹

2. In 2004–2005, Licensee served as a real estate agent for Bradley and Lynn Buckentin (Buckentins) in connection with the sale of their Shakopee home and

¹ Testimony (Test.) of Licensee. The ALJ also notes in relation to the above-referenced complaint, that Licensee was sanctioned in May 2010 by the Minnesota Association of Realtors for violation of its Professional Standards. Ex. 7.

the purchase of a home in Belle Plaine, Minnesota.² In connection with these real estate transactions, Licensee provided the Buckentins with an Agency Disclosure Form.³

3. In January 2008, the Buckentins again contacted Licensee. They were interested in the sale of their Belle Plaine home and purchasing a home in the Shakopee area. They had conversations about the fact that the value of the Belle Plaine home was less than the amount owed under the Buckentin's mortgage agreement with CitiMortgage, Inc. (Citi).⁴

4. The Buckentins had little expertise in real estate or financial transactions and relied on the representations of Licensee.⁵

5. On June 24, 2008, the Buckentins entered into an Exclusive Right to Sell Listing Contract with Licensee relative to the sale of the Belle Plaine home.⁶ Licensee did not present an Agency Disclosure Form to his clients at that time.⁷

6. An Agency Disclosure Form was not executed until January 22, 2009, when the Buckentins were presented with a Purchase Agreement for their Belle Plaine home. Licensee did not provide his clients with an executed Agency Disclosure Form until March 2009, shortly before the closing on the sale of the Belle Plaine home.⁸

7. The Buckentins, among other terms, insisted that the short sale not affect their credit rating in any way. They were adamant that if this condition was not met, they would not sell the Belle Plaine home.⁹ The Licensee incorporated this condition into the Purchase Agreement.¹⁰

8. The Buckentins did not negotiate with Citi relative to the terms of the short sale, full release, or deficiency judgment. Instead, they relied on Licensee's representations to Citi.¹¹

9. On March 4, 2009, Citi sent a letter to the Buckentins and Licensee agreeing to accept a "short payoff" on the Buckentin loan as well as agreeing to fully release the Buckentins on their loan and pursue no deficiency judgment against the Buckentins. The Citi letter made no reference to the credit rating condition insisted upon in the Purchase Agreement.¹² The Buckentins denied receiving the Citi letter.¹³

² Test. of Licensee and B. Buckentin.

³ *Id.*

⁴ *Id.* The outstanding mortgage at the time was approximately \$220,000, Licensee listed the property for sale at \$179,900, and the home sold for \$151,300.

⁵ Test. of B. Buckentin.

⁶ Ex.1.

⁷ Ex. K.

⁸ *Id.*

⁹ Test. of B. Buckentin.

¹⁰ Test. of B. Buckentin, Ex. 2 at 5. Specifically, the provision in the Purchase Agreement states, "Also, CitiMort to not allow this transaction to change the sellers (sic) credit rating in any way."

¹¹ Test. of B. Buckentin.

¹² Exs. 3, 4.

¹³ Test. of B. Buckentin.

10. Also during the first week of March 2009, Licensee called Bradley Buckentin to discuss the letter. When Bradley Buckentin asked whether the short sale would affect his credit, Licensee said “no.” Licensee then encouraged Buckentin to start looking for a new home in Shakopee.¹⁴

11. The Buckentins paid Licensee a broker commission of \$7,565 for the sale of the Belle Plaine home.¹⁵

12. Once the Belle Plaine home short sale was reported to the credit reporting agencies, the Buckentin’s credit rating was adversely affected and they were precluded from obtaining home mortgage financing until recently.¹⁶

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 45.027, 82.82, and 82.67.

2. The Notice of and Order for Hearing was proper, and the Department has complied with all relevant legal and procedural requirements.

3. Minn. Stat. § 45.027, in relevant part, states,

Subd. 6. Violations and penalties.

The commissioner may impose a civil penalty not to exceed \$10,000 per violation upon a person who violates any law, rule, or order related to the duties and responsibilities entrusted to the commissioner unless a different penalty is specified.

Subd. 7. Actions against licensees.

(a) In addition to any other actions authorized by this section, the commissioner may, by order, deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the commissioner, as described under section 45.011, subdivision 4, or censure that person if the commissioner finds that:

(1) the order is in the public interest; and

(2) the person has violated any law, rule, or order related to the duties and responsibilities entrusted to the commissioner;

(b) The commissioner shall issue an order requiring a licensee ... to show cause why the license should not be revoked or suspended, or the licensee censured

¹⁴ Test. of B. Buckentin.

¹⁵ Ex. 4.

¹⁶ Compare Ex. 5, dated July 8, 2008, to Ex. 6, dated May 19, 2009: Equifax: down 16%, Experian: down 12%, and Trans Union: down 12%.

4. Minn. Stat. § 82.81, subd. 12, in relevant part, states,

(a) **Prohibitions.** For the purposes of section 82.82, subdivision 1, clause (b), the following acts and practices constitute fraudulent, deceptive, or dishonest practices:

(10) make any false or misleading statements, or permit or allow another to make any false or misleading statements, of a character likely to influence, persuade, or induce the consummation of a transaction contemplated by this chapter....

5. By denying in the phone conference of March 2009 to Bradley Buckentin that their credit rating would not be adversely affected, Licensee violated Minn. Stat. § 82.81.

6. The Broker/Salesperson owes a duty of loyalty to his customer. Minn. Stat. § 82.67, subd. 3 (2) requires the Broker/Salesperson to act only in client(s)' best interest.

7. By pursuing his commission for the sale of the Belle Plaine home instead of informing the Buckentins that a short sale would likely adversely affect their credit, Licensee violated his duty to act in his client's best interest and Minn. Stat. § 82.67.

8. Minn. Stat. § 82.67, in relevant part, states,

Subdivision 1. Agency disclosure.

A real estate broker or salesperson shall provide to a consumer in the sale and purchase of a residential real property transaction at the first substantive contact with the consumer an agency disclosure form in substantially the form set forth in subdivision 4. The agency disclosure form shall be intended to provide a description of available options for agency and facilitator relationships, and a description of the role of a licensee under each option. The agency disclosure form shall provide a signature line for acknowledgment of receipt by the consumer. The disclosures required by this subdivision apply only to residential real property transactions.

9. The Licensee violated Minn. Stat. § 82.67 when he failed to provide the Agency Disclosure Form at the first substantive contact in June 2008, when the Buckentins entered into the Exclusive Right to Sell Listing Contract with Licensee.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner of Commerce impose a penalty equivalent to the commission received by Licensee for the sale of the Belle Plaine home or other appropriate licensing sanction.

Dated: September 6, 2012

MANUEL J. CERVANTES
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Michael Rothman, Commissioner, Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101 to learn about the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The issues in this case are as follows: First, did Licensee make a misleading statement of omission which was of a character likely to induce the sale of the Belle Plaine home in violation of Minnesota law? Second, did Licensee violate his duty under Minnesota law to act in his client's best interest? Third, did Licensee violate Minnesota law by failing to provide an Agency Disclosure Form to his client at the first substantive contact? Based on the documentary evidence and evidence adduced at the hearing, the ALJ concludes that Department prevails on each issue.

Given his twenty-plus years of experience in the real estate business and his knowledge of the possible consequences of short sales, Licensee was obligated to reveal this information to the Buckentins as early as June 2008, when they requested that language be included in the Purchase Agreement to protect against any adverse effect to their credit. Licensee's silence on this question at that time is a violation of Minn. Stat. § 82.81. This statute was further violated in March of 2009 just prior to the closing on the Belle Plaine home, when Licensee called Bradley Buckentin to

congratulate him that Citi had approved the short sale. The violation occurred when Licensee said “no” when Buckentin asked whether this would have a negative impact on his credit. Instead, Licensee chose to pursue the sale of the home and his sales commission over his client’s interest of protecting his credit. This was a violation of his duty of loyalty and Minn. Stat. § 82.67.

Licensee argued that the Buckentins should have known that there was the possibility of an adverse effect to their credit because Ryskamp had told Buckentins numerous times that there was no way of knowing what might happen to their credit based on a short sale. Licensee’s argument is misplaced. Any representations by Ryskamp do not relieve Licensee of his duty to act in his client’s best interest. The record does not reflect that Licensee made similar representations to the Buckentins. When Licensee wrote the hold harmless language in the Purchase Agreement, and given Licensee’s silence, the Buckentins had a reasonable expectation that the hold harmless language would be enforceable.

The ALJ concludes that the Licensee did not provide the Buckentins with the Agency Disclosure Form at the first substantive contact in June 2008 when Licensee had them sign the Exclusive Right to Sell Listing Contract. Instead, it was not provided until March 2009, weeks before the closing on the home sale.

The Agency Disclosure statute states, “[t]he agency disclosure form shall be intended to provide a description of available options for agency and facilitator relationships, and a description of the role of a licensee under each option.” By failing to provide the disclosure at the onset of the legal relationship, the clients were deprived of the benefit intended by the legislature. The fact that Licensee provided the disclosure in 2004 during his first role as agent for the Buckentins is not legally sufficient to satisfy the statute’s disclosure requirement in 2008.

The facts of record support a licensing sanction.

M.J.C.